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8 IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

9 DIVISION II

10 IN RE: PERSONAL RESTRAINT
11 PETITION OF:

12 JOSE ISIDRO-SOTO,
13
14

Case No. 46673-2-II

**SUPPLEMENTAL RESPONSE TO
PERSONAL RESTRAINT
PETITION**

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16 **1. IDENTITY OF RESPONDING PARTY**

17 The petitioner, Jose Isidro-Soto responds by and through his attorney of
18 record, Eric John Makus of Makus Law PS.

19 **2. SUPPLEMENTAL RESPONSE**

20 The Court has requested the petitioner to submit a supplemental response in
21 light of the defendant's evidentiary hearing on the merits of the Petitioner's personal
22 restraint petition.
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24 **3. RELIEF REQUESTED**

25 The Petitioner requests the Personal Restraint Petition filed herein be
26 granted, his conviction vacated, and the matter remanded to the trial court for further
27 proceedings.
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1 **4. GROUNDS FOR RELIEF AND ARGUMENT**

2 **Issues:**

3 **a. Is the Petitioner's Claim Time-barred Pursuant to RCW**
4 **10.73.090?**

5 No. The petitioner's claim is not time barred under RCW 10.73.090. It falls
6 within the exception set out in RCW 10.73.100(6) for motions based on a significant
7 change in the law that is retroactively applicable. *In re Personal Restrain of Yung-*
8 *Cheng Tsai*, 183 Wash.2d 91, 351 P.3d 138 (2015) the Washington Supreme Court
9 held that *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284
10 (2010) applies retroactively in Washington. The court held that "Because Padilla
11 did not announce a new rule under Washington law, it applies retroactively to
12 matters on collateral review under *Teague*." *In re Tsai*, 183 Wash.2d 91, 103 (2015).
13 The court held that *Padilla* significantly changed Washington law and *Padilla*
14 related claims alleging immigration related ineffective assistance of counsel qualify
15 for an exception to the one-year time bar in RCW 10.73.090(1) under RCW
16 10.73.100(6). Under *Padilla*, the petitioner is entitled to relief.

17 **b. Did the Petitioner Receive Ineffective Assistance of Counsel?**

18 Yes. Counsel's performance was deficient and the deficient performance
19 prejudiced the defense.

20 To obtain relief based on ineffective assistance of counsel, the defendant has
21 the burden of proving that (a) counsel's performance was deficient and (b) the
22 deficient performance prejudiced the defense. *Strickland v. Washington* 466 U.S.
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1 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and *State v. McFarland*, 127
2 Wn2d 322, 335, 899 P.2d 1251 (1995).

3 The counsel's performance was deficient. The defendant's conviction was a
4 clearly deportable offense. Under *Sandoval*¹, the defendant's lawyer's affirmative
5 duty was to refer to the immigration statute and advise the defendant that by
6 pleading guilty, he would be deportable from the United States. The defendant's
7 attorney testified that he did not research whether a criminal conviction would make
8 the defendant deportable and did not consult with an immigration attorney in this
9 case and the trial court found this testimony credible.²

11 The defendant's attorney testified that he did not misadvise³ the defendant
12 and the trial court found this testimony credible.⁴

14 However, the defendant's attorney testified that "he may not have advised"⁵
15 the defendant of the immigration consequences of his conviction and that "it's
16 possible"⁶ he never advised the defendant that by pleading guilty he would be facing
17 certain deportation⁷ and the court found this testimony credible.⁸

19 *Padilla* rejected the proposition that only affirmative misadvice about the
20 deportation consequences of a guilty plea, but not the failure to give such advice,
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23 ¹ *State v. Sandoval*, 171 Wn.2d 163, 249 P.3d 1015 (2011).

24 ² Evidentiary Hearing Transcript, Grays Harbor County Superior Court before the
25 Honorable Judge F. Mark McCauley, March 10, 2016, Page 24, Lines 8-13, Page 34,
26 Line 13 through Page 35, Line 16, and Page 64, Lines 6-13.

27 ³ Ibid. Pages 33-34 and Page 40, Line 25 through Page 41, Line 3.

28 ⁴ Ibid. Page 63, Lines 20 through 21 and Page 63, Line 25 through Page 64, Line 1.

⁵ Ibid. Page 42, Line 17.

⁶ Ibid. Page 33, Lines 6-7.

⁷ Ibid. Page 64, Lines 1-6.

⁸ Ibid. Page 64, Lines 6-13.

1 could constitute ineffective assistance of counsel. *Padilla v. Kentucky* 130 S. Ct.
2 1473, 1484 (2010).

3 The defendant testified that the defendant's lawyer did not inquire about his
4 immigration status and did not advise him to consult an immigration attorney, and
5 that he did not consult an immigration attorney before accepting the plea
6 agreement.⁹

8 Testimony from the defendant and the defendant's lawyer are evidence the
9 petitioner was not advised on the deportation consequences of his guilty plea.
10 Counsel's performance was deficient.

12 To establish prejudice, the defendant must show a reasonable probability
13 that, but for counsel's errors, he would not have pleaded guilty and would have
14 insisted on going to trial.

15 The defendant testified that he would not have accepted the plea agreement
16 if he had been advised that his plea of guilty would result in his certain
17 deportation.¹⁰

19 The defendant established reasonable probability that he would have insisted
20 on going to trial if counsel had correctly informed him of the consequences of
21 pleading guilty. The defendant received ineffective assistance of counsel.

22 5. CONCLUSION

24 Isidro-Soto's petition should be granted on grounds that under *Yung-Cheng*
25 *Tsai*, his petition is not time barred and under *Padilla*, he is entitled to relief.

26 ⁹ Evidentiary Hearing Transcript, Grays Harbor County Superior Court before the
27 Honorable Judge F. Mark McCauley, March 10, 2016, Page 48, Line 19 through Page
28 49, Line 13.

¹⁰ Ibid. Page 50, Lines 18-21.

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2 **DATED** this 6th day of SEPTEMBER, 2016.

3 Respectfully Submitted,

4 MAKUS LAW PS

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6
7 BY: 

8 Eric John Makus, WSBA No. 41683
9 Counsel of Record for Jose Isidro-Soto